Testimony of Lincoln C. Oliphant,
Research Fellow, The Marriage Law Project,*
to the
Subcommittee on the Constitution
of the
House Judiciary Committee, United States House of Representatives

"LEGAL THREATS TO TRADITIONAL MARRIAGE:
IMPLICATIONS FOR PUBLIC POLICY"

Washington, D.C., April 22, 2004

Mr. Chairman and Members of the Committee:

I wish to start by thanking the highest court in Massachusetts for deciding the *Goodridge* cases.[1] I offer my thanks, not because the Court was right or wise or just – indeed, I regard those opinions as radical[2] and wrong[3] – but because the *Goodridge* cases have alerted us all to the perils that we face.

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* The Marriage Law Project is a legal research effort at The Catholic University of America's Columbus School of Law. The Project is located within the Interdisciplinary Program on Law and Religion, chaired by Professor Robert A. Destro. The purpose of the Marriage Law Project (MLP) is to provide scholarly, legal, and educational support for the proposition that marriage is the union of one man and one woman. The views expressed in this testimony are Mr. Oliphant's and not any institution's or other individual's.

[1] *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003) (4-to-3 decision), and *Opinion of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004) (4-to-3 decision).

[2] See Appendix A for some of the reasons.

[3] See Appendix B for one of the reasons.

Had it not been for the *Goodridge* cases (and a related decision by the U.S. Supreme Court[4]), this hearing would not have been held, and the distinguished members of this Committee would not now be thinking about marriage in America. It is those cases that are chiefly responsible for alerting the people of the United States, the Congress of the United States, and the President of the United States to the legal, social, and moral challenges to marriage that lie ahead. If those challenges are not faced squarely and successfully, the status of marriage in this country will be fundamentally changed – to our profound regret, I believe.

I thank the Committee for inviting me to testify on the public policy implications of changing America's marriage laws. I will touch on a handful:

I. The Big Issues: Legitimacy and Morality

The four Massachusetts justices who decided the *Goodridge* cases believe that the Congress of the United States is composed of men and women who have lost their reason, their mental capacity, their rationality. Then, too, they think you are bigots.

Just eight years ago, the 104th Congress (with the concurrence of a Democratic President) enacted (by overwhelming, bipartisan majorities[5]) the Defense of Marriage Act, Public Law 104-199, which says that for purposes of Federal law, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband

[4] *Lawrence v. Texas*, 539 U.S. 558 (2003), overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986).

[5] DOMA was reported out of the House Judiciary Committee by vote of 22 to 3. The Act passed the House of Representatives by vote of 342 to 67. It passed the Senate by vote of 85 to 14.

or a wife." 1 U.S.C. §7. According to those Massachusetts judges who decided *Goodridge*, these definitions are simply irrational.

If given a chance, those judges would declare DOMA unconstitutional.[6] Why? Because defining marriage as the union of one man and one woman is, according to their opinion in *Goodridge*, so unreasonable that it cannot withstand even the most minimal constitutional scrutiny. As if that were not enough, those judges also opined that since there is no rational basis for restricting marriage to one man and one woman, a legislative body that does so define marriage must have been motivated by prejudice. This is the law and rationale of *Goodridge*.[7]

Today's hearing is about the public policy implications of changing marriage. Congress and all of the Nation's legislatures must understand that the foremost implication of the current strategy against marriage is to divest elected officials of their long-standing powers to define and protect marriage. If the *Goodridge* approach is

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[6] Congress believed that DOMA was eminently constitutional. Indeed, this Committee's own report said "it would be incomprehensible" for a court to decide what the *Goodridge* court decided. The report said, "Nothing in the [U.S. Supreme] Court's recent decision [in *Romer v. Evans*, 116 S. Ct. 1620 (1996)] suggests that the Defense of Marriage Act is constitutionally suspect. It would be incomprehensible for any court to conclude that traditional marriage laws are . . . motivated by animus toward homosexuals. Rather, they have been the unbroken rule and tradition in this (and other) countries primarily because they are conducive to the objectives of procreation and responsible child-rearing." H. Rpt. No. 104-664 at 33, 104th Cong., 2d Sess. (1996).

When the U.S. Department of Justice was asked to give its opinion about the constitutionality of DOMA it said it "believe[d] that [DOMA] would be sustained as constitutional." *Id.* at 33-34. After *Romer v. Evans* was handed down, the Department was asked if it had changed its mind, and it said no: "The Administration continues to believe that H.R. 3396 [DOMA] would be sustained as constitutional if challenged in court, and that it does not raise any legal issues that necessitate further comment by the Department. As stated by [President Clinton's] spokesman Michael McCurry . . . the Supreme Court ruling in *Romer v. Evans* does not affect the Department's analysis (that H.R. 3396 is constitutionally sustainable), and the President 'would sign the bill if it was presented to him as currently written.'" *Id*. at 34.

[7] "The marriage ban works a deep and scarring hardship on a very real segment of the community *for no rational reason*. The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, *suggests that the marriage restriction is rooted in persistent prejudices against persons who are . . . homosexual. 'The Constitution cannot control such prejudices but neither can it tolerate them.*' . . ." 798 N.E.2d, at 968 (emphasis added; citation omitted).

adopted by the Federal courts, Congress will find itself in the same unenviable position as the Massachusetts Legislature.

The State of Massachusetts attempted to defend its marriage laws by pointing to three primary (and a couple of subsidiary) rationales. The *Goodridge* court flatly rejected each. Congress should remember that the same rationales and arguments were used to justify DOMA. The chart compares the bases for the two laws:

Column 1. Rationales Presented To the *Goodridge* Court To Justify the Massachusetts Law	Column 2. Massachusetts Court On Constitutional Sufficiency Of Rationales in Column 1		Column 3. Rationales Used by the House Judiciary Committee To Justify DOMA
Procreation (798 N.E.2d, at 962-64)	Irrational & Likely Bigoted (798 N.E.2d, at 968)		Responsible Procreation (*House Report* at 12-15)
Optimal Child-rearing (*Id*.)	Irrational & Likely Bigoted (*Id*.)		Responsible Child-Rearing (*Id*.)
Conserving Scarce Resources (*Id*. 964-7)	Irrational & Likely Bigoted (*Id*.)		Preserving Scarce Resources (*Id.* at 18)
Avoiding Interstate Conflict (*Id.* at 967)	Irrational & Likely Bigoted (*Id*.)		Protecting Sovereignty & Democracy (*Id*. at16-18)
Morality (*Id*.) (suggested by *amici*)	Irrational & Likely Bigoted (*Id*.)		Morality (*Id*. at 15-16)

To repeat, DOMA is doomed if those Massachusetts judges get hold of it[8] – and a Federal court applying the law and reasoning of the Massachusetts court will strike down

[8] It is interesting that the Defense of Marriage Act does not appear in the *Goodridge* opinions. Perhaps the Massachusetts court's enthusiasm for following the lead of two Canadian courts (which it cited approvingly a couple of times) caused it to neglect the statutory laws of the United States. One might suppose that the duly enacted laws of our National Government would be at least as probative for Massachusetts judges as the decisions of Canada's provincial courts. The Massachusetts court is not formally bound by DOMA, but DOMA is the single best example in the United States of what marriage means and how it fits within the American framework of law, society, and family.

DOMA (with its "Column 3 rationales") as surely as the Massachusetts court struck down its marriage law (with it "Column 1 rationales").

The *Goodridge* cases have gotten good press, but they were against all precedent (see Appendix A), and Congress and the State legislatures must not get into the habit of thinking that marriage questions belong to the courts. They don't. Marriage does not belong to the courts, and neither does the Constitution.[9]

Legislatures must be willing to defend their constitutional prerogatives. Every Member of Congress swears to protect and defend and uphold the same Constitution that binds the courts. Further, the elected branches have institutional legitimacy – and constitutional wisdom – that is lacking in the courts.

Among elected bodies, the Congress of the United States in particular must not act as if power and legitimacy or wisdom and moral judgment have somehow been transferred elsewhere.

Congress needs to defend democratic processes, and the premises that underlie elected government and majoritarian rulemaking. One scholar put it this way:

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[9] To take but one example that is contrary to *Goodridge*, just six weeks before *Goodridge I* was decided a three-judge Arizona appellate court upheld that State's marriage law. The court said:

> ". . . Petitioners have failed to prove that the State's prohibition of same-sex marriage is not rationally related to a legitimate state interest. We hold that the State has a legitimate interest in encouraging procreation and child-rearing within the marital relationship, and that limiting marriage to opposite-sex couples is rationally related to that interest. Even assuming that the State's reasoning for prohibiting same-sex marriages is debatable, or arguably unwise, it is not 'arbitrary or irrational'. Consequently, [the statutes] do not violate Petitioners' substantive due process or explicit privacy rights and must be upheld." *Standhardt v. Superior Court*, 77 P.3d 451, 463-64, ¶ 41 (Ariz. Ct. App, 2003) (citations omitted). (The equal protection argument was rejected on similar reasoning.)
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> "Consequently, it is for the people of Arizona, through their elected representatives or by using the initiative process, rather than this court, to decide whether to permit same-sex marriages." *Id.* ¶ 49.

In sum, the Arizona appellate court considered the same arguments that were presented to the Supreme Judicial Court of Massachusetts and came to opposite conclusions.

> "What is demanded by the democratic form of government is not submission to the will of the majority because that will is numerically superior but rather submission to the reasoned judgment of the majority. We are obligated to submit to the decision of the majority, not because that decision represents a numerically superior will, but because it represents the best judgment of society with respect to a particular matter at a particular time. It is founded not upon the principle that the will of the many should prevail over the will of the few but rather upon the principle that the judgment of the many is likely to be superior to the judgment of the few. . . ."[10]

And, because of some language in the *Lawrence* case on the relationship of law and morality (which Justice Scalia found ominous[11]), the Congress needs to ensure that it is not deterred from talking about and acting on the moral views of the American people. Congress would have very little work, and Members very little to say, if moral discourse and judgment were excluded from its deliberations:

> ". . . Men often say that one cannot legislate morality. I should say that we legislate hardly anything else. All movements of law reform seek to carry out certain social judgments as to what is fair and just in the conduct of society. What is an old-age pension scheme but an enforcement of morality? Does not the income tax, for all its encrusted technicality, embody a moral judgment about the fairness of allocating the costs of society in accordance with ability to pay? What other meaning can be given to legislation about education and trade unions, betting, public housing, and a host of other problems?"[12]

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[10] John H. Hallowell, THE MORAL FOUNDATION OF DEMOCRACY 120-21 (Univ. of Chicago Press, 1954).

[11] "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding. See *ante*, at 2480 (noting 'an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives *in matters pertaining to sex*' (emphasis added)). The impossibility of distinguishing homosexuality from other traditional 'morals' offenses is precisely why *Bowers* rejected the rational-basis challenge. 'The law,' it said, 'is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." *Lawrence v. Texas*, 123 S. Ct., at 2490 (Scalia, J., dissenting) (citation and footnote omitted).

[12] Eugene V. Rostow, THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW 79 (Yale Univ. Press, 1962).

II. Some Particular Issues for Congress: Bankruptcy, Immigration, Income Tax, Veterans Benefits

The words "marriage" and "spouse" appear several thousand times in the United States Code and the Code of Federal Regulations. If those words are redefined, the tremors will be felt throughout Federal law. This section lists four cases that illustrate how a redefinition of marriage would affect Federal law. Two of these cases are in areas that are within the jurisdiction of this Committee.

I do not argue that Federal law should not be changed. If Congress in its wisdom decides a change is required in bankruptcy law or immigration law then the experts on this Committee should begin that process. Those changes can be made, though, without abolishing marriage in the Federal Code, and without having a court issue a decree that may have far-reaching and injurious consequences in such areas as bankruptcy, immigration, income tax, and veterans' affairs:

One. BANKRUPTCY. In *In re Allen*, 186 Bankruptcy Reporter 769, 1995 Bankr. LEXIS 1446 (Bankruptcy Ct. No. Dist. Georgia, 1995), a same-sex couple sought to file a joint bankruptcy petition as debtor and spouse. This was a pre-DOMA case, and although the bankruptcy code used the word "spouse" it did not define it. However, the court held that Congress intended the word to be used according to its common and approved usage, meaning namely a husband or a wife.[13]

[13] The petitioners asked the court to approve the following definition of spouse: "[T]wo persons who cohabitate, have a positive mutual agreement that is permanent and exclusive of all other relationships, share their income, expenses and debts, and have a relationship that they deem to be a spousal relationship." 186 *B.R.*, at 772. The court declined to consider the constitutionality of the couple's home State's definition of marriage.

This bankruptcy case, *In re Allen*, was about a same-sex couple, but the court discussed several other kinds of family relationships. These are discussed at the end of this section.

Two. IMMIGRATION. In *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982), a male American citizen brought suit challenging the decision of the Board of Immigration Appeals that his same-sex partner (whom he called a "spouse") was not an "immediate relative" under the immigration act. The partner was not, of course, an American citizen. The district court upheld the decision of the board, 486 F. Supp. 1119 (C.D. Cal.1980.), and the Ninth Circuit affirmed.[14]

Three. INCOME TAX. In *Mueller v. Commission of Internal Revenue*, 39 Fed. Appx. 437 (7th Circ. 2002), *cert. denied*, 123 S. Ct. 477 (2002), taxpayer Mueller filed a tax return jointly with his same-sex partner, attempting to be taxed as a married couple filing jointly. Mueller argued that "homosexuals are being taxed in violation of the Equal Protection Clause," and he asked that the Defense of Marriage Act be declared unconstitutional. Id at 437-38. The court rejected his claims. The court did not reach the question of DOMA's constitutionality.

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[14] ". . . We hold that Congress's decision to confer spouse status under section 201(b) [of the Immigration and Nationality Act] only upon the parties to heterosexual marriages has a rational basis and therefore comports with the due process clause and its equal protection requirements. . . .

"Congress manifested its concern for family integrity when it passed laws facilitating the immigration of the spouse of some valid heterosexual marriages. This distinction is one of many drawn by Congress pursuant to its determination to provide some – but not all – close relationships with relief from immigration restrictions that might otherwise hinder reunification in this country. In effect, Congress has determined that preferential status is not warranted for the spouses of homosexual marriages. Perhaps this is because homosexual marriages never produce offspring, because they are not recognized in most, if in any, of the states, or because they violate traditional and often prevailing societal mores. In any event, having found that Congress rationally intended to deny preferential status to the spouse of such marriage, we need not further 'probe and test the justifications for the legislative decision.'" 673 F.2d, at 1042-43.

Four. VETERANS BENEFITS. In *McConnell v. Nooner*, 547 F.2d 54 (8th Circ. 1976), a veterans who was receiving veterans education assistance attempted to obtain additional benefits for his same-sex partner by claiming the partner as his dependent spouse. The Veterans Administration turned him down.

After making various administrative appeals the two men sued in Federal court. Their entitlement to additional benefits turned on whether they were married. The Federal court held that Minnesota law was dispositive, and since "marriages" between persons of the same sex were prohibited in Minnesota (this is the case discussed in Appendix B), the second man was not a "spouse" of the veteran. Benefits were denied.

For as long as there have been veterans' benefits, no Congress has ever anticipated (or budgeted for) same-sex spousal benefits, but Congress can change the law. What Congress must not do is concede its rightful constitutional authority to others.

Perhaps it is time for Congress to direct the GAO to do some cost estimates; however, the future of marriage in American law cannot be reduced to bean-counting. I do not know of any expertise at GAO for weighing and judging moral claims.

A cost estimate would be based on assumptions about the definition of marriage. However, once the definition of marriage begins to expand beyond one man and one woman, it is difficult (and perhaps impossible) to circumscribe a new definition. This point takes me back to the bankruptcy case, *In re Allen*.

In that case, the bankruptcy judge was asked to approve a petition in which one man sought to claim another man as his lawful spouse. The two were not married, so the judge looked for analogous cases. This is how lawyers and judges reason. The judge found, and cited in his opinion (186 *B.R.*, at 772) three analogous situations: There was

the mother-daughter case, *In re Lam*; the mother, father, and son case, *In re Jackson*; and the heterosexual cohabitation case, *In re Malone*.

Many supporters of same-sex marriage say that if same-sex marriages become lawful, judges and legislators still will be able to draw statutory and constitutional lines between the married and the unmarried. Personally, I am skeptical. Once the traditional definition of marriage falls because it is contrary to a generalized principle of equality or an amorphous principle of privacy, how can others with similar claims be refused? To return to the bankruptcy example,[15] whether or not a mother and daughter can marry, they certainly can claim close ties of love and devotion and the sharing of resources. The same with a cohabiting couple. As for combinations of more than two, they soon will be asking how the law can presume to limit their love and companionship to the narrow-minded male-female dualities of an outmoded past.[16]

I urge Congress to protect its prerogatives and precedents, including the Defense of Marriage Act. Don't let others tinker with the fundamental institution of marriage.

I thank the Committee for this opportunity to testify.

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[15] One professor of law has said, "As the choice to marry is a non-economic right . . . and bankruptcy laws are designed to regulate a debtor's economic rights, bankruptcy laws should not be used to either promote or reject this private, non-economic choice. While bankruptcy laws are often used to respond to public policy issues, to facilitate debt repayment, and to protect debtors' rights to a fresh start, Congress should grant marital benefits to any type of unit that functions economically like a married couple." Dickerson, "Family Values and the Bankruptcy Code: A Proposal to Eliminate Bankruptcy Benefits Awarded on the Basis of Marital Status," 67 *Fordham L. Rev.* 69, 112 (1998).

[16] Three consenting adults who desire to intermarry with each other already have filed suit against Utah's polygamy laws. The decision in *Lawrence v. Texas* is the impetus, and so the plaintiffs alleged violations of their constitutional rights to privacy, association, and intimate expression, and they also alleged that the laws impinge on their practice of religion. *Bronson v. Swensen*, No. 02:04-CV-0021 (D. Utah 2004); "Lawyers Square Off Over Polygamy Case," *The National Law Journal*, Jan. 26, 2004, p. 4. The plaintiffs may eventually lose, but no one should make the mistake of thinking the case is frivolous. Frightening yes, but not frivolous in the aftermath of *Lawrence*.

Appendix A:
The Massachusetts Court Was Radical in *Goodridge*

For more than 200 years, *marriage* in Massachusetts meant the lawful union of a man and a woman as husband and wife, but the Supreme Judicial Court of that State decreed in the *Goodridge* cases that same-sex couples are entitled to be married.

The Massachusetts decisions are wholly contrary to the entire experience of American law. There is not one case, statute, or vote that supports the *Goodridge* decisions. Even the same-sex "marriage" cases from Hawaii, Alaska, and Vermont are contrary to the Massachusetts decree.

This Appendix briefly surveys cases from other States. Of course, Massachusetts is not obliged to follow the lead of those other decision-makers, but the people of the Bay State and all Americans are entitled to know where the Massachusetts court stands in relation to all other American law: It stands apart and alone.

All of the older cases are against the result in *Goodridge*.[17]

All the newer cases are against *Goodridge*, too.[18]

Nor is there any support for the Massachusetts court in the cases from Hawaii, Alaska, and Vermont that have found their way into the public consciousness about same-sex "marriage."[19] The chart on the next page helps show how the rationale and result in Goodridge can find no support in even the most favorable of prior cases:

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[17] E.g., *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App., 1973). *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974), *review denied*, 84 Wash.2d 1008 (1974). *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982). *DeSanto v. Barnsley*, 476 A.2d 952, 955-56 (Pa. Super. 1984). *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995).

[18] *Morrison v. Sadler*, Civil Div. No. 49D13-0211-PL-001946, (Marion Co., Indiana, Super. Ct., May 7, 2003) (on appeal). *Standhardt v. Superior Court*, 77 P.3d 451, 463-64 (Ariz. Ct. App, Oct. 8, 2003) (on appeal). *Lewis v. Harris*, docket no. MER-L-15-03, (Super. Ct., Mercer Co., New Jersey, decided Nov. 5, 2003) (on appeal). See also, *Citizens for Equal Protection v. Attorney General*, – F. Supp. –, 2003 WL 22571708 (D. Neb., Nov. 10, 2003) (on appeal) (definition of marriage was unchallenged by plaintiffs).

[19] *Baehr v. Lewin*, 583, 852 P.2d 44, 68 (Haw. 1993) (plurality op.) ("reversed" by Haw. Const., Art. I, Sec. 23 (added 1998)); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct., 1998) ("reversed" by Alaska Const., Art. I, Sec. 25 (effective 1999)); and *Baker v. State*, 744 A.2d 864 (Vt. 1999) (resulting in a far-ranging civil unions law passed by the Legislature, Vt. Stat. Ann. Title 15, §§1201-1207 (Supp. 2001)).

Goodridge Compared to Decisions in Hawaii, Alaska, and Vermont (And These Are the Most Favorable Cases)

The State Court's Opinion . . .	**HI 1993**	**AK 1998**	**VT 1999**	**MA-*Goodridge* 2003/2004**
Mandated Same-Sex Marriage?	No	No	No	Yes
Excluded State Legislature?	No	No	No	Yes
Was Based on General Principles of "Equal Protection"?	No	No	No	Yes
Was Based on General Principles of "Due Process" (Liberty & Privacy)?	No	No	No	Yes
Rejected Every Rationale for Distinguishing Marriage and Keeping It Unique?	No	No	No	Yes
Was Based on Particular, Perhaps Unique, Provision of State Constitution?	Yes (ERA, added 1972 & 1978)	Yes (Express Privacy Provision, added 1972)	Yes ("Common Benefits Clause" from 18th Century)	No (General "Equal Protection" and "Due Process-Liberty-Privacy" Principles)
Provides Support for *Goodridge*'s Rationale?	NO	NO	NO	---
Provides Support for *Goodridge*'s Result?	NO	NO	NO	---

In sum, the *Goodridge* decisions are radical and extreme. The Massachusetts court stands apart and alone.

Appendix B:
One Reason the Massachusetts Court Was Wrong in *Goodridge*

A reader of the *Goodridge* opinions would *not* know that the United States Supreme Court *disagrees* with the rationale of the Massachusetts court. Indeed, the state court treated the key case with inexcusable indifference.

The majority opinion did cite the key case in footnote 3 of *Goodridge I*, and noted that the U.S. Supreme Court had "dismissed" the appeal of the case; however, the *Goodridge* opinion failed to say *why* the appeal was dismissed and that such a dismissal *constitutes a decision on the merits by the U.S. Supreme Court*.

A casual look at the key case shows a Minnesota decision, *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), but that decision was appealed to the U.S. Supreme Court where the "appeal was dismissed for lack of a substantial federal question," 409 U.S. 810 (1972) (mem.). These few words cannot be brushed aside for they denote that the nation's highest court *rendered a decision on the merits* under the U.S. Constitution. *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975).[20]

In *Baker*, two males sought a marriage license from a county clerk who refused to issue it. They sued, alleging violations of their rights under the First Amendment, Eighth Amendment, Ninth Amendment, and Fourteenth Amendment (both due process and equal protection claims) to the U.S. Constitution. The Minnesota Supreme Court rejected all of their arguments, saying in part:

> "These constitutional challenges have in common the assertion that the right to marry without regard to the sex of the parties is a fundamental right of all persons and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory. We are not independently persuaded by these contentions and do not find support for them in any decisions of the United States Supreme Court.
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> "The institution of marriage as a union of a man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), . . . stated in part:

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[20] *Hicks v. Miranda* did not announce a new rule, but restated an old one. In *Hicks*, the Court cited a 1959 opinion of Justice Brennan ("votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case"); the 1969 edition of the leading treatise on Supreme Court practice ("The Court is, however, deciding a case on the merits when it dismisses for want of a substantial question"); and the 1970 edition of perhaps the leading treatise on procedure in federal courts ("Summary disposition of an appeal, however, either by affirmance or by dismissal for want of a substantial federal question, is a disposition on the merits"). 422 U.S., at 344.

'Marriage and procreation are fundamental to the very existence and survival of the race.' This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend. *The due process clause of the Fourteenth Amendment is not a charter for restructuring it by judicial legislation*." 191 N.W.2d at 186 (emphasis added).

"The equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. There is no irrational or invidious discrimination. Petitioners note that the state does not impose upon heterosexual married couples a condition that they have a proved capacity or declared willingness to procreate, posing a rhetorical demand that this court must read such condition into the statute if same-sex marriages are to be prohibited. Even assuming that such a condition would be neither unrealistic nor offensive under the *Griswold* [*v. Connecticut*] rationale, the classification is no more than theoretically imperfect. We are reminded, however, that 'abstract symmetry' is not demanded by the Fourteenth Amendment.[21]

"*Loving v. Virginia*, 388 U.S. 1 (1967), upon which petitioners additionally rely, does not militate against this conclusion. Virginia's antimiscegenation statute, prohibiting interracial marriages, was invalidated solely on the grounds of its patent racial discrimination. . . ." Id. at 187.

It was the decision just quoted that the U. S. Supreme Court refused to review on direct appeal – and, as explained above, that refusal constitutes *a decision on the merits.*

A few year after *Baker v. Nelson*, the same two plaintiffs went to court again (this time in an attempt to get "spousal benefits" under a law providing educational benefits to veterans), but the U. S. Court of Appeals for the Eighth Circuit cited *Baker v. Nelson* and *Hicks v. Miranda* and held, "The appellants have had their day in court on the issue of their right to marry under Minnesota law *and under the United States Constitution*. They, therefore, are collaterally estopped from relitigating these issues once more." *McConnell v. Nooner*, 547 F.2d 54, 56 (8th Cir. 1976) (emphasis added) (the "veterans case," *supra*).

The rule of *Hicks v. Miranda* has some twists and turns.[22] Nevertheless, it is still a good rule. The Supreme Court's *decision on the merits* in *Baker v. Nelson* may (or may not) be modified in light of more recent developments, but that is no excuse for ignoring the precedent or failing to give it the weight it is due.

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[21] At this point in its opinion, the Minnesota court inserted a footnote that cited two U.S. Supreme Court cases where that court said, "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." 191 N.W.2d, at 187 n. 4.

[22] See, *Metromedia, Inc. v. City of San Diego*, 101 S. Ct. 2882, 2888 (1981), and *Washington v. Confederated Band & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 478 n. 20 (1979). See especially, Jurisdictional Statement, *Baker v. Nelson*, U.S. S. Ct. no. 71-1027 at 3. See also, Lim, "Determining the Reach and Content of Summary Decisions," 8 *Review of Litigation* 165 (1989), and Comment, "The Precedential Effect of Summary Affirmances and Dismissals for Want of a Substantial Federal Question by the Supreme Court after *Hicks v. Miranda* and *Mandel v. Bradley*," 64 *Va. L. Rev*. 117 (1978).